

**REMARKS/ARGUMENTS**

Claims 13-21 and 27-32 are pending in the present application. Claims 16-21 have been withdrawn from consideration. The Specification has been objected to as having an Abstract with more than 150 words and also possessing several informalities. The Abstract has been amended and is resubmitted to overcome these objections. Claims 13, 15, 28, 31, and 32 have been rejected under 35 U.S.C. § 102(b) as being anticipated by Nelson et al. (U.S. Patent No. 5,218,309). Claim 14 has been rejected under 35 U.S.C. § 103(a) as being unpatentable over Nelson in view of Funk et al. (U.S. Patent No. 4,584,655). Claims 27 and 30 have been rejected under 35 U.S.C. § 103(a) as being unpatentable over Nelson in view of Brown et al. (U.S. Patent No. 3,870,951). Claim 29 has been rejected under 35 U.S.C. § 103(a) in view of Nelson in view of Myers (U.S. Patent No. 5,561,250). All rejections are respectfully traversed.

Independent claim 13 has been rejected under 35 U.S.C. § 102(b) as being anticipated by Nelson et al. Anticipation "requires that the same invention, including each element and limitation of the claims, was known or used by others before it was invented by the patentee." Hoover Group, Inc. v. Custom Metalcraft, Inc., 66 F.3d 299, 302, 36 U.S.P.Q.2d 1101, 1103 (Fed. Cir. 1995). "[P]rior knowledge by others requires that all of the elements and limitations of the claimed subject matter must be expressly or inherently described in a single prior art reference." Elan Pharms., Inc. v. Mayo Foundation for Medical Educ. & Research, 304 F.2d 1221, 1227, 64 U.S.P.Q.2d 1292 (Fed. Cir. 2002) (citing

*In re Robertson*, 169 F.3d 743, 745, 49 U.S.P.Q.2d 1949, 1950 (Fed. Cir. 1999); Constant v. Advanced Micro-Devices, Inc., 848 F.2d 1560, 1571 7 U.S.P.Q.2d 1057, 1064 (Fed. Cir. 1988)). "The single reference must describe and enable the claimed invention, including all claim limitations, with sufficient clarity and detail to establish that the subject matter already existed in the prior art and that its existence was recognized by persons of ordinary skill in the field of the invention." *Id.* (citing Crown Operations Int'l, Ltd. v. Solutia Inc., 289 F.3d 1367, 1375, 62 U.S.P.Q.2d 1917, 1921 (Fed. Cir. 2002); In re Spada, 911 F.2d 705, 708 15 U.S.P.Q.2d 1655, 1657 (Fed. Cir. 1990)). See also PPG Indus., Inc. v. Guardian Indus. Corp., 75 F.3d 1558, 1566, 37 U.S.P.Q.2d 1618, 1624 (Fed. Cir. 1996) (emphasis added).

Claim 13 requires in part, the step of "applying the frequency to a reference". The Nelson reference does not teach the step of applying a frequency to a reference as claimed by the Applicant and instead applies a plurality of frequencies to a single article, or sample such as a single grain kernel, seed, nut, fruit, or other agricultural or botanical product that is placed between the electrodes of the assembly. (Col. 3, lines 3-9).

According to the Examiner, Nelson et al. does not explicitly disclose (applying the frequency to a reference) but claims it is inherent that a first frequency can be referenced to a second frequency for comparison. (Office action page 4). Anticipation can occur when a claimed limitation is inherent or otherwise implicit in the relevant reference. Standard Havens Products, Inc. v. Gencor Industries, Inc., 953 F.2d 1360, 1369 (Fed. Cir. 1991); Continental Can Company USA, Inc. v. Monsanto Company, 949

F.2d 1264, 1267 (Fed. Cir. 1991). "Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing may be the result from a given set of circumstances is not sufficient." In re Oelrich, 666 F.2d 578, 581, 212 USPQ 323, 326 (CCPA 1981) (quoting Hansgrig v. Kemmer, 102 F.2d 212, 214, 40 USPQ 665, 667 (CCPA 1939)). Under the principals of inherency, if a structure in the prior art necessarily functions in accordance with the limitations of a process or method claim of an application, the claim is anticipated. In re King, 801 F.2d 1323, 231 USPQ 136, 138 (Fed. Cir. 1986). Nonetheless, for a prior art reference to anticipate a claim, the reference must disclose each and every element of the claim with sufficient clarity to prove its existence in the prior art . . . although this disclosure requirement presupposes the knowledge of one skilled in the art of the claimed invention, that presumed knowledge does not grant a license to read into the prior art reference teachings that are not there. Motorola, Inc. v. Interdigital Technology Corp., 121 F.3d 1461, 43 USPQ2d 1481, 1490 (Fed. Cir. 1997).

Nelson teaches applying a plurality of frequencies to a single article, or sample such as a single grain kernel, seed, nut, fruit, or other agricultural or botanical product that is placed between the electrodes of the assembly. (Col. 3, lines 3-9). Nelson does not teach the possibility that the plurality of frequencies could be used as a reference. Thus one skilled in the art would have to read the Applicant's disclosure to read this teaching into the prior art, and therefore Nelson does not inherently teach a reference frequency. Therefore, the Applicant submits that

the first frequency of the Nelson patent is not inherently a reference to the second frequency.

Applicant asserts that even if the Nelson reference inherently teaches that a first frequency can be referenced to a second frequency for comparison the Examiner's position is still not consistent with the requirements of claim 13. Claim 13 requires the step of applying a frequency to a parallel plate cell that is filled with grain thus receiving a first complex admittance, and then applying the same frequency to a reference, which is different than the original plate cell filled with grain, such as for example a plate cell with no grain. Therefore, the claim requires applying a single frequency to two different samples within a parallel cell. In contrast the Nelson patent teaches applying two different frequencies to a single sample within a parallel cell. (Col. 2, line 62-Col. 3, line 6). Thus, frequency is only applied to a single sample (piece of grain in plate cell) and not to two different samples (grain filled plate cell and reference plate cell) as is required by claim 13. Thus, all the claim limitations to claim 13 are not met and the anticipation rejection should be withdrawn. Furthermore, claims 14-15 and 27-32 all depend on claim 13 and therefore for at least this reason are similarly in allowable form.

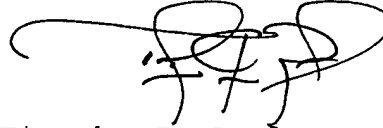
#### CONCLUSION

If any issues remain that may be expeditiously addressed in a telephone interview, the Examiner is encouraged to telephone the undersigned at 515-558-0200. All fees or extensions of time believed to be due in connection with this response are attached hereto; however, consider this a

Application No. 10/718,147  
Docket No. P05388US1  
Reply to Office Action of December 20, 2004

request for any extension inadvertently omitted, and charge  
any additional fees to Deposit Account 50-2098.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Zarley', with a large, looping flourish extending from the top left.

Timothy J. Zarley  
Reg. No. 45,253  
ZARLEY LAW FIRM, P.L.C  
Capital Square  
400 Locust Street, Suite 200  
Des Moines, IA 50309-2350  
Phone No. (515) 558-0200  
Fax No. (515) 558-7790  
Customer No. 34082  
Attorneys of Record

- JLH/bjs -